Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

No. 93-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AETNA LIFE INSURANCE COMPANY

JOHN J. SWENSON
Counsel of Record
THOMAS E. SATROM
LAWRENCE E. KOLE
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 4000
Los Angeles, California 90067-3026
(310) 552-8500

Attorneys for Respondent Aetna Life Insurance Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Where petitioner has not alleged that an Employee Retirement Income Security Act ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. Section 1001 *et. seq.*, plan has terminated nor has petitioner presented admissible evidence of the plan's termination, has failed to attempt to effect service of process on the ERISA plan named as a defendant in his complaint, has failed to serve any discovery to determine the plan's status or the entity responsible for the plan's liabilities and has failed to seek a default judgment against the plan, may petitioner assert that he has been deprived of all remedies he might possess simply because the plan has terminated?

2. May petitioner assert that he has been deprived of due process and property under the Fifth Amendment in his certiorari petition when he has not raised such arguments in the courts below?

3. Did the Court of Appeals err in finding that ERISA preemption survives the purported termination of petitioner's ERISA plan and applies regardless of whether petitioner has a remedy against respondent as ERISA fiduciary?

4. Is there a conflict between the Court of Appeals' decision below and decisions of this Court or among the Courts of Appeals as to whether there is a right to individual relief for breach of fiduciary duty or to monetary relief under ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3)?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The parent of respondent Aetna Life Insurance Company is Aetna Life and Casualty Company. Aetna Life Insurance Company has the following non-wholly owned subsidiary: Med Southwest, Inc. Aetna Life Insurance Company has a wholly-owned subsidiary, AHP Holdings, Inc., which has certain non-wholly subsidiaries. AHP Holdings, Inc. has the following non-wholly owned subsidiaries: Healthways, Inc.; Aetna Health Plans of San Diego, Inc.; Aetna Health Plans of Colorado, Inc.; PHPSNE Parent Corporation; Aetna Health Plans of Florida, Inc.; and Partners Health Plan of Pennsylvania, Inc.

TABLE OF CONTENTS

	Page
RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES	ii
I. JURISDICTION STATEMENT: THIS COURT LACKS AUTHORITY TO GRANT THIS PETITION BECAUSE THE COURT OF APPEALS BELOW LACKED JURISDICTION	1
II. MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE	3
A. Misstatements Concerning The Procedural History	3
B. Factual Misstatements	4
III. SUMMARY OF ARGUMENT	5
IV. REASONS FOR DENYING THE WRIT	6
A. The Central Assumption Underlying The Petition, That Dockter Lacks Any Remedy, Is Inconsistent With His Failure To Pursue Recovery From The Plan	6
B. Dockter's Constitutional Arguments May Not Now Be Asserted Because They Were Not Raised Below	8
C. The Court Of Appeals Correctly Found That ERISA Preempted State Law Claims Against Aetna As Fiduciary Regardless Of Plan Termination	9
D. The Ninth Circuit's Opinion Does Not Conflict With Decisions Of This Court Nor Of Other Courts Of Appeal	10
1. The Ninth Circuit's Decision Below That There Is No Individual Right To Relief Under Section 502(a)(3) Was Consistent With *Russell*	11

2. There Is No Conflict Among The Circuits Regarding The Right To Individual Relief Under Section 502(a)(3) 12

3. This Court's Opinion in *Mertens v. Hewitt Associates* Precludes Any Conflict Among The Courts Of Appeal Regarding The Availability Of Damages Under Section 502(a)(3) 15

4. The Interpretation In *Mertens* Is Not Limited To Claims Against Non-Fiduciaries, However, Even If It Was So Limited, There Is No Conflict Among The Circuits Regarding The Availability Of Damages Under Section 502(a)(3) 16

V. CONCLUSION 18

TABLE OF AUTHORITIES

Cases:	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)	8
Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988)	9
Austad v. U.S., 386 F.2d 147 (9th Cir. 1967)	4
Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689 (6th Cir. 1989), *cert. den.*, 495 U.S. 905, *reh. den.*, 496 U.S. 932 (1990)	14,17
Davis v. United States, 417 U.S. 333, 94 S. Ct. 351, 38 L. Ed. 2d 234 (1973)	15
Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir.), *cert. den.*, 488 U.S. 909 (1988)	13,17
E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19, 106 S. Ct. 1681, 90 L. Ed. 2d 19 (1986)	8
Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985)	6
Gibson v. Prudential Ins. Co. of America, 915 F.2d 414 (9th Cir. 1990)	6
Harsch v. Eisenberg, 956 F.2d 651 (7th Cir.), *cert. den.* ___ U.S. ___, 113 S. Ct. 61 (1992)	13,17
Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991)	13
In re White Farm Equipment Co., 42 B.R. 1005 (N.D.Ohio 1984)	9
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S.Ct. 478, 112 L. Ed. 2d 474 (1990)	7,9-10
International Union UAW Local 91 v. Park-Ohio Indus., 876 F.2d 894 (6th Cir. 1989)	14,17
Kuhl v. Lincoln Nat'l Health Plan of Kansas City, 999 F.2d 298 (8th Cir. July 7, 1993)	16

Table of Authorities Continued

Page

Lafoy v. HMO Colorado, 988 F.2d 97 (10th Cir. 1993) 17

Lee v. Burkhart, 991 F.2d 1004 (2nd Cir. 1993) .. 17

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L. Ed. 2d 96 (1985) 11

Mertens v. Hewitt Associates, ___ U.S. ___ , 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) 10,12,15-16

Novak v. Anderson Corp., 962 F.2d 757 (8th Cir. 1992), *cert. den.*, ___ U.S. ___ , 113 S. Ct. 2928 (1993) 17

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L. Ed. 2d 49 (1987) 9

Powell v. Chesapeake & Potomac Telephone Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), *cert. den.*, 476 U.S. 1170 (1986) 17

Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986) 12-13,17

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, (5th Cir.), *reh. den.*, 797 F.2d 977 (1986), *cert. den.*, 479 U.S. 1034, 479 U.S. 1089 (1987) 17

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) 1,3

United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir.), *reh. den.*, 861 F.2d 1281 (1988), *cert. den.*, 489 U.S. 1096, *reh. den.*, 490 U.S. 1076 (1989) 17

Warren v. Society National Bank, 905 F.2d 975 (6th Cir. 1990), *cert. den.*, ___ U.S. ___ , 111 S. Ct. 2256 (1991) 13-14,17

Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957) 15

Table of Authorities Continued

	Page
Constitutional Provisions and Statutes:	
U.S. Const. amend V	8
28 U.S.C.	
§ 1254	1,3
§ 1291	1
§ 1292	1,3
29 U.S.C.	
§ 1002(1)	9
§ 1103(d)	9
§ 1109	10-11
§ 1132(a)(1)(B)	6
§ 1132(a)(2)	10-12
§ 1132(a)(3)	*passim*
§ 1132(d)	7
Other Authorities:	
Federal Rules of Evidence	
Rule 402	5
Rule 602	5
Federal Rules of Civil Procedure	
Rule 12(f)	5
Rule 54	3
Sixth Circuit Rule 24(c)	14
Supreme Court Rule 10.1	14
13 Moore's Federal Practice ¶ 810.21	15
Stern, Gressman & Shapiro *Supreme Court Practice* § 4.6 (1986)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-308

LAWRENCE DOCKTER,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AETNA LIFE INSURANCE COMPANY

I. JURISDICTION STATEMENT: THIS COURT LACKS AUTHORITY TO GRANT THIS PETITION BECAUSE THE COURT OF APPEALS BELOW LACKED JURISDICTION

Petitioner Lawrence Dockter's ("Dockter") petition should be denied because the Court of Appeals below lacked jurisdiction. *See* 28 U.S.C. § 1254 (only cases "in" the Courts of Appeals may be reviewed by this Court on certiorari); *United States v. Nixon*, 418 U.S. 683, 690-92, 94 S. Ct. 3090, 3098-99, 41 L. Ed. 2d 1039 (1974)(certiorari review requires that the Court of Appeals' jurisdiction has been properly invoked).

As the following explanation shows, the District Court never rendered a decision over which the Court of Appeals had jurisdiction. *See* 28 U.S.C. § 1291 & 1292.

Dockter neglects to mention the basis for the District Court's order purporting to dismiss the action. Petition at 3. The defendants named in Dockter's complaint were respondent Aetna Life Insurance Company ("Aetna"), Getty Oil Company ("Getty") and the Getty Long Term Disability Plan ("the Plan"). After Dockter served the complaint on Getty, Four Star Oil Co. ("Four Star"),[1] Getty's successor company, appeared in the action in lieu of Getty. The District Court's dismissal order stated that no defendants remained in the action. In support of this order, the District Court referred to its prior orders granting Aetna's motion for judgment on the pleadings and defendant Four Star's motion for dismissal, and denying Dockter's motion for leave to amend. However, none of these earlier orders dismissed the First Amended Complaint in its entirety. The effect of these orders was to grant judgment for Aetna on the First Amended Complaint, to dismiss that complaint as to Four Star, and to refuse to allow an amendment to that complaint proposed by Dockter. As a result, the First Amended Complaint remained as against the Plan and the District Court erred in finding that no defendants remained.

Therefore, the District Court never rendered a decision over which the Court of Appeals had jurisdiction as its order was neither a final judgment under

---

[1] Subsequent to Texaco, Inc.'s purchase of Getty, Getty was renamed Four Star. Four Star has admitted that it is Getty's successor in interest.

Federal Rules of Civil Procedure Rule 54[2] nor was it an appealable interlocutory decision under 28 U.S.C. Section 1292[3]. As the jurisdiction of the Court of Appeals was not properly invoked below, this action was never "in" the Court of Appeals, therefore, this Court lacks authority to review the case by a writ of certiorari. *See* 28 U.S.C. § 1254; *Nixon*, 418 U.S. at 690-92.

II. MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

A. Misstatements Concerning The Procedural History

As discussed above, Dockter's statement of the case is incorrect because the Court of Appeals lacked jurisdiction over this case. The summary of the proceedings below contained in Dockter's statement of the case is generally accurate, however, it contains two important misstatements. First, as discussed above, Dockter failed to mention that the District Court erred when it stated that no defendants remained in the case in its order of dismissal. In addition, Dockter erroneously states that he served his First Amended Complaint on the Plan. Petition at 6. Dockter has never before claimed to have performed such service nor does the record below contain any indication that the Plan was served.

---

[2] The District Court did not terminate the action as to all defendants nor did it direct entry of a final judgment as to fewer than all of the claims or parties. Fed. Rules Civ. Proc. Rule 54(b).

[3] The District Court's order did not involve an injunction or a receiver, nor an admiralty case, nor did it certify the order for an interlocutory appeal. 28 U.S.C. § 1292.

B. Factual Misstatements

This petition concerns the adequacy of Dockter's pleading, therefore, it is improper for Dockter to assert additional facts not alleged in his complaint or to seek to rely on extrinsic evidence. *See Austad v. U.S.*, 386 F.2d 147, 149 (9th Cir. 1967). As the plaintiff's material allegations of fact must be accepted as true for the purpose of motions testing the adequacy of the complaint, Aetna accepted Dockter's allegations as true *arguendo* in the Courts below.[4]

The following factual assertions made by Dockter in his petition are misstatements because they are either not contained in his complaint or are inconsistent with allegations made therein. Dockter never alleged that premiums were paid by employee payroll deduction and forwarded by Getty, Dockter's former employer, to Aetna. Petition at 3-4. The complaint alleged that Aetna had discretion to review denied claims, not that claims were adjusted by Aetna and that Aetna had discretion to pay or deny a claim. *Id.* at 4. The complaint alleges that Getty, not Aetna, delayed providing claims forms to Dockter, that Dockter returned the forms to Getty, not Aetna, and that Aetna merely reviewed and affirmed the denial of Dockter's claim, not that Aetna denied the claim. *Id.* Dockter asserts that the Plan terminated in March 1986, however, he has never alleged termination in any pleading. *Id.* at 9.

---

[4] Of course, Aetna accepts these allegations as true solely for the purposes of the proceedings which occurred below and this petition; it does not admit that any of these allegations are true, nor does it waive any rights it has to contest any of these allegations in the future.

Dockter made additional factual misstatements in his petition which were derived from improper extrinsic evidence. Citing a declaration offered by Four Star, Dockter asserts *inter alia* that the Plan terminated in 1986 and that the Plan no longer exists.[5] Dockter also misstates that Four Star was "found" not to be an ERISA fiduciary—the District Court made no such finding. *Id.* Dockter further makes a baseless representation that the District Court's purported "finding" was based on the statements made in the above-mentioned declaration, which statements, in any event, are extrinsic and inadmissible[6]. *Id.* at 9 & n. 7. The District Court never stated that its ruling was based in any manner on this declaration.

III. SUMMARY OF ARGUMENT

Dockter has failed to pursue recovery from the Plan, therefore, his central factual assumption, i.e., that he lacks any remedy, is false. Even if Dockter had been left remediless, he may not advance the constitutional arguments contained in his petition because they were never raised below. Dockter has not established any

---

[5] Additional misstatements are that Aetna was insurer of all benefits under the Plan, was solely responsible for processing and administering claims and for determining benefit eligibility, processed, paid and made all decisions as to paying or denying all claims, and issued all benefit checks; that the Plan was entirely paid for by employees of Getty; that Getty was not responsible for paying any Plan benefits and was only involved by collecting Plan premiums and forwarding them to Aetna. Petition at 6, n. 5, & 9, n. 7.

[6] The declaration is inadmissible because the declarant lacked personal knowledge and because, as extrinsic evidence, it was irrelevant. *See* Fed. R. Evid. Rules 402 & 602. Aetna objected to the declaration on these grounds and moved to strike it pursuant to Federal Rules of Civil Procedure Rule 12(f).

basis for exercise of certiorari jurisdiction because the Court of Appeals' holding below that Dockter's claims were either preempted by or not cognizable under ERISA was consistent with this Court's decisions and with the decisions of the other Courts of Appeals. Furthermore, Dockter's reliance on authority showing merely an intra-circuit conflict (from a different circuit than that which ruled below) rather than a conflict among the circuits is inadequate to create a basis for certiorari jurisdiction.

IV. REASONS FOR DENYING THE WRIT

A. The Central Assumption Underlying The Petition, That Dockter Lacks Any Remedy, Is Inconsistent With His Failure To Pursue Recovery From The Plan.

Although Dockter contends that he still has an ERISA remedy against Aetna as a fiduciary under ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3) (this assertion is discussed in detail below), the primary argument made in his petition is that the purported termination of the Plan leaves him without a remedy under ERISA and that he should therefore be permitted to pursue state common law causes of action. In the proceedings below, unlike in his petition, Dockter asserted that he was entitled to sue Aetna for recovery of ERISA benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B). After this contention was rejected because actions for benefits under Section 502(a)(1)(B) may only be maintained against the ERISA Plan itself, not against ERISA fiduciaries, based on *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 417 (9th Cir. 1990) and *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-5 (9th Cir. 1985), Dockter recognized that he had no

remedy against Aetna under ERISA and attempted to amend his complaint to assert state law claims against Aetna. The District Court correctly rejected this, as ERISA preempts state law claims regardless of whether a plaintiff would otherwise lack a remedy. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144, 111 S.Ct. 478, 112 L. Ed. 2d 474 (1990)(ERISA preemption displaces all state law claims even when state law authorizes a remedy unavailable under ERISA or ERISA contains no remedy). Dockter then argued in the Court of Appeals below, and continues to so argue in his petition, that this ruling leaves him remediless (unless Dockter's misguided attempt to extend ERISA Section 502(a)(3) to allow monetary relief for individual beneficiaries is accepted), and is therefore a violation of his Fifth Amendment rights.

Dockter's contention that he lacks a remedy is fundamentally flawed because it is based on the incorrect premise that he cannot obtain relief from the Plan itself. First, Dockter has never established any basis, whether by pleading or admissible extrinsic evidence, that the Plan terminated. Even if Dockter could nonetheless rely on the Plan's purported termination, he has utterly failed to make any effort whatsoever to prosecute his claims against the Plan. Dockter never attempted to serve the Plan, even though ERISA Section 502(d), 29 U.S.C. Section 1132(d), provides that a Plan may be served by service of summons upon the Plan Administrator in its capacity as such (although Getty was the Plan Administrator, Getty was not served in its capacity as such, but rather only in its corporate capacity). Dockter failed to serve any discovery as to the Plan's current status or the identity of the party who assumed the assets and

liabilities of the Plan, nor did he try to obtain a default judgment against the Plan. For all these reasons, Dockter's central factual assumption that he has been left without a remedy unless the decisions of the lower courts are set aside is baseless.

B. Dockter's Constitutional Arguments May Not Now Be Asserted Because They Were Not Raised Below.

Dockter's argument that he has been deprived of due process and of property without just compensation in violation of the Fifth Amendment is fatally flawed, because, as discussed above, he has failed to demonstrate that he does not have an adequate remedy against the Plan itself. Regardless, though, this Court should not consider Dockter's constitutional argument because Dockter is raising this issue for the first time in his petition. This Court ordinarily will not address issues not raised below. *See e.g. E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1681, 90 L. Ed. 2d 19 (1986)(dismissing writ of certiorari as improvidently granted because this Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (refusing to consider legal basis for plaintiff's claim asserted in certiorari petition but not on appeal because this Court will not ordinarily consider issues neither raised nor considered by the Court of Appeals). There is no reason that Dockter could not have raised this issue earlier, as he has maintained throughout these proceedings that he will be without a remedy if he is not permitted to proceed against Aetna. Therefore, this Court should decline to consider this issue.

C. The Court Of Appeals Correctly Found That ERISA Preempted State Law Claims Against Aetna As Fiduciary Regardless Of Plan Termination.

The Court of Appeals correctly ruled that ERISA preempted Dockter's asserted state law claims against Aetna regardless of whether the Plan had terminated. ERISA governs all claims which relate to employee benefit plans. *See e.g. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L. Ed. 2d 49 (1987); *citing* 29 U.S.C. § 1144(a). Claims under ERISA plans that have terminated relate to an employee benefit plan within the meaning of ERISA no less than do such claims for benefits from currently operating plans. *See* 29 U.S.C. § 1002(1)(defining "employee welfare benefit plan" to include any plan which was established or maintained in the past); *see also* 29 U.S.C. § 1103(d)(setting forth rules under ERISA governing plan termination). Accordingly, it has been held that ERISA is applicable to terminated plans. *See e.g. Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1408-09, 1418-19 (9th Cir. 1988). As ERISA preempts all state law claims, *Pilot Life*, 481 U.S. at 54, the Court of Appeals below correctly found that ERISA preemption survived plan termination. *See also In re White Farm Equipment Co.*, 42 B.R. 1005, 1012 (N.D.Ohio 1984), *rev'd on other grounds*, 788 F.2d 1186 (6th Cir. 1986) (discussing ERISA preemption and concluding that ERISA governed plan termination). The possibility raised by Dockter that termination may leave a beneficiary without a remedy has no bearing whatsoever on ERISA preemption—this Court has held that ERISA preempts state law claims even where state law authorizes a remedy unavailable under ERISA or ERISA contains no remedy. *See Ingersoll-*

Rand, 498 U.S. at 144; *see also Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S. Ct. 2063, 2071, 124 L. Ed. 2d 161 (1993) (rejecting argument that ERISA may not deprive beneficiaries of rights they had in the absence of ERISA).

D. The Ninth Circuit's Opinion Does Not Conflict With Decisions Of This Court Nor Of Other Courts Of Appeals.

Dockter's petition should be denied because it fails to establish that the Ninth Circuit's opinion in the instant matter conflicts with the decisions of this Court or of other Courts of Appeals. Dockter contends that a conflict exists on two separate issues:

(1) whether there is a "private right of action" for breach of fiduciary duties under ERISA Section 502(a)(3)[7], and

---

[7] Dockter's use of the term "private right of action" is misleading. None of the cases he cites held that there is no general private right of action for breach of fiduciary duty under ERISA. Rather, the cases hold that an individual beneficiary may only sue in a representative capacity in order to obtain benefits on behalf of the plan as a whole. The language of Sections 502(a)(2) and (3) itself expressly invests plan participants and beneficiaries with a right of action for appropriate relief under ERISA Section 409, 29 U.S.C. Section 1109, and for equitable relief for violations of ERISA or the terms of an ERISA plan, respectively. Thus, there is no question that a private right of action exists for breach of fiduciary duty under ERISA—plan participants and beneficiaries have an express statutory right to sue to protect their plan. The issue here is the nature of the remedies allowed for such a breach. Therefore, Dockter must intend the term "private right of action" to mean recovery of relief which benefits an individual plan beneficiary rather than the plan.

(2) whether the provision for recovery of "other appropriate equitable relief" in Section 502(a)(3) includes monetary relief.

Obviously, if Dockter has no individual right to relief for breach of fiduciary duty under Section 502(a)(3), the latter question concerning the type of relief available is immaterial. Therefore, the availability of relief to individual beneficiaries will be addressed first.

1. The Ninth Circuit's Decision Below That There Is No Individual Right To Relief Under Section 502(a)(3) Was Consistent With *Russell*.

Dockter incorrectly argues that as this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139, n. 5, 105 S.Ct. 3085, 87 L. Ed. 2d 96 (1985) did not reach the question of the relief available under Section ERISA 502(a)(3) but was instead limited to relief under Section 502(a)(2), 29 U.S.C. Section 1132(a)(2), the Ninth Circuit could not extend the rationale underlying *Russell* to a claim under Section 502(a)(3). ERISA Section 409(a), 29 U.S.C. Section 1109(a), describes the extent of liability for a breach of fiduciary duty by an ERISA fiduciary. Section 502(a)(2) merely creates a right of action for relief under Section 409(a).

In *Russell*, 473 U.S. at 142-44, this Court held that the language of ERISA indicates that only breaches of fiduciary duty which harm the plan itself rather than those which injure the rights of individual beneficiaries are actionable under Sections 409(a) and 502(a)(2). Neither Section 409(a) nor 502(a)(2) establish any fiduciary duties; these provisions only set forth remedies for breach of such duties. Section 502(a)(3) merely provides another remedial mechanism

for violations of other portions of ERISA, therefore, it would be anomalous to read into Section 502(a)(3) an expansion of the types of fiduciary breaches which give rise to liability. Furthermore, if the relief available for breach of fiduciary duty were broader under Section 502(a)(3) than under 502(a)(2), Section 502(a)(2) would be superfluous, an interpretation which would be contrary to proper statutory construction. *See Mertens*, 113 S. Ct. at 2069 (refusing to read ERISA in a manner that would render part of the statute superfluous).

It is quite logical that the Congressional intent to limit fiduciary liability to situations where the ERISA plan is harmed rather than those in which individual benefit claims are mishandled, which this Court declared in *Russell*, should be applied to claims for relief based on Section 503(a)(3). Therefore, the Ninth Circuit's decision below denying Dockter individual relief under Section 502(a)(3) is consistent with this Court's *Russell* decision.

2. There Is No Conflict Among The Circuits Regarding The Right To Individual Relief Under Section 502(a)(3).

Contrary to Dockter's assertion, the Ninth Circuit's opinions on the availability of individual relief for breach of fiduciary duty under Section 502(a)(3) have consistently denied such relief and are in accord with the law established in other circuits. In the language quoted by Dockter from the Ninth Circuit's decision in *Sokol v. Bernstein*, 803 F.2d 532, 536 (9th Cir. 1986) the court stated that ERISA grants no right by a "beneficiary *qua* beneficiary" to sue for breach of fiduciary duty but rather limits such actions to those brought on behalf of the plan itself. *See* Petition

at 23. The *Sokol* court declared that there was no basis not to apply this rule to Section 502(a)(3), 29 U.S.C. Section 1132(a)(3). 803 F.2d at 536. Both *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417-18 (9th Cir. 1991), which followed *Sokol*, and the Ninth Circuit's decision below, following *Horan*, invoked this limitation. Two other circuits that have addressed the issue have found that ERISA beneficiaries have no right to individual recovery under Section 502(a)(3). *See Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir.)[8], *cert. den.*, 488 U.S. 909 (1988)(recognizing that *Russell*'s conclusion that there is no right to individual recovery for breach of fiduciary duty under Section 502(a)(2) should be extended to Section 502(a)(3)); *Harsch v. Eisenberg*, 956 F.2d 651, 657 (7th Cir.), *cert. den.* ___ U.S. ___, 113 S. Ct. 61 (1992)(approving of *Sokol*'s reasoning in rejecting individual recovery for breach of fiduciary duty).

The Sixth Circuit has not taken a clear position on this issue. In the unique factual circumstances it encountered in *Warren v. Society National Bank*, 905 F.2d 975, 980-82 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S. Ct. 2256 (1991), where full benefits were paid yet the plaintiff suffered damages due to the timing of the payment, the Sixth Circuit allowed a claim by a beneficiary for individual relief under Section 502(a)(3). Dockter contends that *Warren* creates a conflict between the Sixth Circuit and other Courts of Appeals on this issue. However, as pointed out in the dissenting opinion in *Warren*, *Warren* itself is in

---

[8] The First Circuit's *Drinkwater* opinion, which Dockter miscites as conflicting with Ninth Circuit law, actually quoted and followed *Sokol*. *See* Petition at 28; 846 F.2d at 825.

conflict with other Sixth Circuit decisions. *Id.* at 984-86 (Wellford, J. dissenting). In *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 696 (6th Cir. 1989), *cert. den.*, 495 U.S. 905, *reh. den.*, 496 U.S. 932 (1990), the Court affirmed the denial of plaintiff's motion to join individual members of an ERISA benefits committee as defendants for breach of fiduciary duty. The Court found that ERISA did not allow recovery of compensatory or punitive damages by an individual beneficiary for breach of fiduciary duty. *Id.* In *International Union UAW Local 91 v. Park-Ohio Indus.*, 876 F.2d 894 (6th Cir. 1989), an unpublished opinion cited by the *Warren* dissent[9] the Sixth Circuit ruled that *Russell* precluded a claim for individual relief under Section 502(a)(3) and followed *Sokol*. *Warren*, 905 F.2d at 985 (Wellford, J. dissenting).[10]

The foregoing discussion demonstrates that there is not a conflict *among* the circuits on this issue, but rather, a conflict *within* the Sixth Circuit. Such a conflict within a particular circuit does not constitute the type of conflict which will support a grant of certiorari within the express terms of Supreme Court Rule 10.1. Furthermore, this Court ordinarily will not

---

[9] The Sixth Circuit permits citation of unpublished opinions if no published opinion would serve as well. Sixth Circuit Rule 24(c).

[10] Furthermore, *Warren* is distinguishable from the instant case because the *Warren* plaintiff had received all the benefits to which he was entitled and was suing not to recover benefits but instead for damages suffered as a result of the fiduciary's alleged misconduct. *See* 905 F.2d at 976. Here, by contrast, Dockter merely seeks benefits. Therefore, the *Warren* opinion does not provide a basis for granting Dockter's petition.

grant certiorari to resolve a conflict internal to one circuit. *See e.g.*, 13 Moore's Federal Practice ¶ 810.21 and Stern, Gressman & Shapiro *Supreme Court Practice* § 4.6 (1986), both *citing* Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958); *cf. Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 351, 38 L. Ed. 2d 234 (1973)(noting this Court's previous denial of certiorari petition where party opposing petition showed that conflict alleged was intra-circuit); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957)(stating that it is primarily the task of the Court of Appeals to reconcile its internal differences and refusing to accept certified question pertaining to intra-circuit conflict). Even if this Court were inclined to disregard its customary practice and to consider the Sixth Circuit's internal conflict, this petition is not an appropriate vehicle for so doing because it involves a *Ninth* Circuit decision. Therefore, the existence of one Sixth Circuit decision among several which conflicts with the decision below should not be considered to provide a basis for granting Dockter's petition.

3. This Court's Opinion in *Mertens v. Hewitt Associates* Precludes Any Conflict Among The Courts Of Appeals Regarding The Availability Of Damages Under Section 502(a)(3).

In its recent decision in *Mertens*, 113 S. Ct. at 2068-69, this Court ruled that the remedies available under Section 502(a)(3) did not include monetary relief. This Court's decision that the phrase "other appropriate equitable relief" used in Section 502(a)(3) is limited to relief typically recoverable in equity, such as injunctions, mandamus and restitution, precludes any conflict among the Courts of Appeals in regard to the availability of monetary relief. Therefore, Dock-

ter's contention that he has a right to pursue a contractual entitlement to monetary benefits under Section 502(a)(3) must be rejected.

4. The Interpretation In *Mertens* Is Not Limited To Claims Against Non-Fiduciaries, However, Even If It Was So Limited, There Is No Conflict Among The Circuits Regarding The Availability Of Damages Under Section 502(a)(3).

Although *Mertens* involved the restricted question of a non-fiduciary's liability for monetary damages under ERISA, this Court's interpretation of the language of Section 502(a)(3) contained therein is equally applicable to claims against fiduciaries. *See Kuhl v. Lincoln Nat'l Health Plan of Kansas City*, 999 F.2d 298 (8th Cir. July 7, 1993) (currently available on WESTLAW; reference occurs at page 28 of 30)(stating that *Mertens* ratified the Court of Appeals decisions holding that Section 502(a)(3) does not include monetary relief). This Court's analysis in *Mertens* focused on Congress' intent in using the modifier "equitable" to describe the type of relief permitted. *See* 113 S. Ct. at 2068-71. On its terms, Section 502(a)(3) makes no distinction between the relief available from fiduciaries as opposed to non-fiduciaries. Nor was this Court's construction of Section 502(a)(3) based on the circumstance that the defendant in *Mertens* was not a fiduciary. Thus, there is no basis for limiting the statutory interpretation in *Mertens* to actions against non-fiduciaries. This Court's decision in *Mertens* precludes Dockter's argument that he may seek monetary relief from Aetna under Section 502(a)(3).

Even if *Mertens* was not applicable to claims under Section 502(a)(3) against fiduciaries, Dockter's argu-

ment must fail because there is no conflict among the Courts of Appeals as to the unavailability of monetary relief thereunder. On the contrary, the overwhelming weight of authority has established that monetary relief may not be recovered. The Ninth Circuit and eight of the ten other circuits have unequivocally held that "equitable" relief under Section 502(a)(3) does not include monetary relief for breach of fiduciary duty. *See Sokol*, 803 F.2d at 537 (9th Cir.); *Drinkwater*, 846 F.2d at 825 (1st Cir.); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2nd Cir. 1993); *Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. den.*, 476 U.S.1170 (1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464-65 (5th Cir.), *reh. den.*, 797 F.2d 977 (1986), *cert. den.*, 479 U.S. 1034, 479 U.S. 1089 (1987); *Harsch*, 956 F.2d at 656-60 (7th Cir.); *Novak v. Anderson Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *cert. den.*, ___U.S. ___ , 113 S. Ct. 2928 (1993); *Lafoy v. HMO Colorado*, 988 F.2d 97, 99-101 (10th Cir. 1993); *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1508-09 (11th Cir.), *reh. den.*, 861 F.2d 1281 (1988), *cert. den.*, 489 U.S. 1096, *reh. den.*, 490 U.S. 1076 (1989).

The Sixth Circuit has taken conflicting positions as to the right to monetary relief for breach of fiduciary duty under Section 502(a)(3). The *Warren* opinion permitted a claim for monetary relief under Section 502(a)(3). *See* 905 F.2d at 980-82. However, as discussed above, *Warren* is in conflict with other Sixth Circuit cases, *see id.* at 984-86 (Wellford, J. dissenting) *citing Davis*, 887 F.2d at 696 and *International Union UAW Local 91*, 876 F.2d 894, and the exist-

ence of an intra-circuit conflict in the Sixth Circuit is not sufficient to support a grant of certiorari, particularly in this case, which comes to this Court from the Ninth Circuit, and in view of the otherwise unanimous decisions of the other Courts of Appeals.

V. CONCLUSION

For all of the foregoing reasons, Aetna respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN J. [illegible]VENSON
Counsel of Record
THOMAS E. SATROM
LAWRENCE E. KOLE
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Suite 4000
Los Angeles, California 90067-3026
(310) 552-8500

Attorneys for Respondent
Aetna Life Insurance Company